Foman v. Davis

Oral Argument - November 14, 1962

Earl Warren

Number 41, Lenore Foman, Petitioner, versus Elvira A. Davis, Executrix.

Mr. Bordwin.

Milton Bordwin

Mr. Chief Justice Warren, Your Honors and may it please the Court.

This case is here on a writ of certiorari to the United States Court of Appeals for the First Circuit having arisen on the District Court before the District of Massachusetts.

The case is here on a writ of certiorari to the United States Court of Appeals for the First Circuit having arisen in the District Court before the District of Massachusetts on diversity of citizenship jurisdiction.

Thank you.

The case has never gone beyond the pleading stage.

The District Court dismissed the action on the ground that the complaint failed to state a claim for which relief could be granted.

The plaintiff filed a motion to amend her complaint and the District Court without opinion denied the motion.

In the Court of Appeals, the adequacy of the complaint was not tested, the Court holding that the appeal from the judgment dismissing the action had not properly been taken and the Court of Appeals dismissed that portion of the appeal which related to the judgment of dismissal.

Insofar as the District Court's denial of plaintiff's motion to amend her complaint, the Court of Appeals said, “There are no facts that appear to us that would indicate an abuse of discretion”, that is the considerations before the District Court are not before us and they affirmed those orders.

This case raises some very basic questions in the area of Federal Civil Procedure and the issues and our arguments will appear in a full statement of the facts.

This is a case brought against a decedent's state.

The plaintiff is the daughter of the decedent and she alleges in her complaint the following.

For some years prior to 1947, the plaintiff's wife, decedent's mother, was confined to a sanatorium for mental and other disorders.

In 1947, the decedent requested of the plaintiff, his daughter that she take over responsibility for the care and support of her mother.

And in 1947, the complaint alleges, the parties orally agreed that the plaintiff would take care of her mother, incur all the liabilities and costs for her support and maintenance and orally, the decedent promised that he would neither make nor leave a will to the end that his daughter as his only child would take her intestate share of his estate under the Intestacy Laws of Massachusetts.

The complaint continues alleging full performance by the plaintiff of her part of the agreement.

She paid all the costs of her mother's care and support in the sanatorium.

In 1951, when it became impossible or impracticable for the sanatorium to care for her mother any longer, she took her mother into her own home and there cared for her until the date of her death in 1953, some six years after the alleged oral agreement.

In 1957, the decedent remarried, and in that year made a will in which he bequeathed his entire estate except for a $5000 legacy to a brother, to his wife Elvira A. Davis, the individual named as executrix in this action.

Some two years after the marriage, the decedent died.

The complaint concludes with a prayer for judgment in that amount which would equal the amount to which the plaintiff would have been entitled to, had the decedent died without making a will as allegedly promise.

What is that amount?

Milton Bordwin

That amount is two-thirds of his estate which turned out to be $60,000 or $40,000.

Her share with the $40,000 (Voice Overlap) --

Milton Bordwin

Her share with the $40,000.

-- agreement.

Milton Bordwin

Yes sir.

In due course, the defendant filed an answer in the motion to dismiss the complaint on the ground that it failed to state a claim for which relief could be granted.

William O. Douglas

This was the -- it diversity jurisdiction, is it?

Milton Bordwin

Excuse me sir?

Yes sir, this is on diversity jurisdiction and the District Court on December 16th of 1960 allowed that motion and dismissed the complaint.

In its memorandum opinion, it made clear that the only grounds on which it relied were that the statute of frauds constituted a bar to recovery on the expressed oral contract.

It did not consider whether the complaint stated a claim for relief on any other basis that is implied contract of quantum meruit.

And on December 19th, the District Court entered judgment dismissing the action.

The very next day, the plaintiff filed two motions in the District Court.

One, to vacate the judgment of dismissal, and the other, to amend her complaint and she proffered her proposed amendment.

That was what day?

Milton Bordwin

That was December 20th, the day after the judgment was entered.

That Amendment added two new factors which did not appear in the original complaint.

One was the specification of the dollar amount which the plaintiff had to spend in caring for her mother, $12,500 and a prayer for judgment in that amount.

And plaintiff asked for a jury trial.

I would like to, for a moment, call the Court's attention to an error in our amendment which appears on page 10 of the record, in paragraph 2 of the amendment.

The word defendant appears instead of the word decedent.

This we took to be a clerical error, however, the defendant has raised this point a number of times in the courts below and raises it here and we would like to clarify what we feel to be the position of this error now.

The Court of Appeals in its first opinion and this error was raised to the Court of Appeals in its first opinion on the bottom of page 13 of the record, characterized this Amendment as “a second cause of action for moneys paid and services rendered for and on behalf of the decedent”.

We would take it then that the Court of Appeals has foreclosed any further argument that that word defendant was intended and that they took it to be an error --

Earl Warren

Where does that appear that you say Mr. --

Milton Bordwin

That sir is on the bottom of page 13 of the record in the Court of Appeals' opinion where they characterized the amendment as a second -- about four

lines from the bottom, the second cause of action for moneys paid and services rendered for and on behalf of the decedent.

We say that they implicitly overruled the argument that was made to them that defendant was intentional.

In any event, these two motions, the motion to vacate judgment and the motion to amend the complaint were both pending when the appeal period from the judgment was about to run out and the plaintiff apprehends unless she lose her right to appeal from that judgment on January 17th, 1961.

He filed a notice of appeal with the First Circuit Court of Appeals from the judgment.On January 23rd, both motions were denied by the District Court.

That is the motion to vacate judgment and motion to amend were denied without opinion.And on January 26th, we filed our second notice of appeal from the orders denying these two motions.

Within the time prescribed by the rules, the -- both appeals were docketed in the Court of Appeals that is within the 40-day period from the first notice of appeal.

Both appeals were docketed in the Court of Appeals, and on February 24th, that court consolidated them for argument.

On March 3rd, the plaintiff filed a statement of points in compliance with the Federal Rules of Procedure and the rules of the First Circuit, a statement of points upon which she intended to rely.

Here, she raised the two main areas that were -- that arose from each appeal, one, the propriety of the judgment dismissing the action, two, the propriety of the orders denying leave to amend.

Subsequently, briefs were filed in exchange, and again, these two issues were argued.

On the fourth oral argument was had before the Court of Appeals for the First Circuit.

And on the oral argument, Judge Aldridge inquired of the -- of counsel as to what was properly before the Court on appeal.

Specifically he asked was the judgment which dismissed the action properly before the court on appeal.

In its opinion, the Court of Appeals held, “No, the judgment was not properly before the Court”.

And it reasoned as follows.

It said, whether the judgment was before the Court of Appeals, depended on whether it was a final decision, whether it was appealable when the first notice of appeal was filed.

This in turn, depends on the effect, our motion to vacate had on the finality of the judgment that is certain motions will affect the finality of the judgment and others will not.

The Court said that the motion being undesignated could have been filed under either Rule 59 which deals with motions to alter or amend judgments or under Rule 60 which deals with relief from judgment.

If it was filed under Rule 59, says the Court, the time for taking an appeal is told.

And this, says the Court, means that the judgment has deprived of its finality, and therefore, any notice of appeal filed during the impendency of a 59 motion is premature and presumably void.

Rule 60 motions do not affect the finality of the judgment, and therefore, any notice of appeal filed during dependency of a 60 motion would be valid or otherwise timely.

The Court holds -- and this page 14 of the record.

“Although the cases do authorize a vacating of a judgment under both rules in the proper circumstances, we believe that the full context of the Rules dictates that resort should be made to the procedure under Rule 59 if time for applying for such motions has not expired”.

This then is the ground that the Court relies on, this full context of the Rules reasoning, it seems, from the 10-day limitation in Rule 59.

That is, the Court of Appeals seems to be saying, since a motion under Rule 59 must be filed within 10 days of judgment and your motion was filed within 10 days of judgment, therefore, it is a Rule 59 motion.

Therefore, you get no review on the merits because your judgment was not final.

Your notice of appeal was premature and we will dismiss the appeal insofar as it is taken from the judgment.

The Court notes the alternative results that will be achieved under a 59 or a 60 treatment but this doesn't enter into their decision nor do they advert to the policy that cases be decided on their merits wherever possible rather than

dismissed on the procedural technicality.

The Court's approach -- the Court's academic approach is illustrated by its citation of Professor Moore's criticism of the Chicago and Northwest Railway case.

In that case, the judgment was entered by the District Court dismissing the action for improper venue.

The plaintiff then filed a motion to vacate the judgment and to have the case transferred to the proper district.

The District Court granted the motion specifically relying on Rule 60.

Professor Moore says this is wrong because the Court didn't have to rely on Rule 60.

The motion was filed within 10 days and it could have relied on Rule 59.

This maybe so but it didn't make one wit of difference in that case whether it was 59 or 60.

And in this case, it's of crucial importance.

In regard to the second notice of appeal which we filed, the Court of Appeals says, “You could have referred to the judgment but you didn't.

You referred only to the denial of your post judgment motions and that of course doesn't cover the judgment”.

And they dismissed the appeal insofar as it's taken from the judgment.

On the second aspect of the appeal that is the propriety of the orders denying us that leave to amend, the Court says, “There is nothing presented by the record to show the circumstances which were before the District Court for its consideration and ruling on the motions, we therefore cannot say that the District Court abused its discretion”.

There was no mentioned by the Court of Rule 15 (a) which says that permission to amend should be freely given when justice requires.

There is no mentioned by the Court of the fact and I raise this for the first time now.

It's in the brief but I haven't raised it in oral earlier.

The Court does not mention the fact that the District Court refused to follow a First Circuit case, the 1933 case of Cleaves versus Kenny in holding as it did on the statute of frauds issue.

Cleaves versus Kenny held that an oral contract to revoke a will and codicil and to die intestate were not barred by the statute of frauds.

The plaintiff expressly relied on that.

The District Court shows not to follow this, there is no mention made of this factor nor is there a mention made by the Court of Appeals of the question whether the complaint as it stood would have sufficed to be a basis for recovery in quantum meruit.

In due course, the plaintiff filed a petition for rehearing with the Court of Appeals.

We cited to them a line of cases representing every federal jurisdiction -- federal appellate jurisdiction including this Court and including the First Circuit.

Those cases uniformly held that where a notice of appeal refers not to a judgment but to the denial of post-judgment motions if the intention to appeal from the judgment will otherwise appear, the Court will review the judgment.

Rehearing was denied and the Court of Appeals said in respect to this on page 21 of the record, plaintiff's second notice of appeal cannot be said to indicate an intention to appeal from the original judgment of dismissal.

Thus, the Court required that the intention to appeal appear from the second notice or not at all.

The Court disregards the first notice which was an expressed intention of appeal of -- intention to appeal from the judgment.

It disregards the statement of points, it disregards the briefs filed by both parties and it disregards the fact that the defendant was in nowise prejudiced by this technical error.

Indeed, it seems that our care in filing that first notice of appeal, prejudices us for the Court says, “Since your intention must appear from the second notice, it does not -- you obviously intended your first notice to cover the judgment and now that we say that your first notice is premature and void, you argue that your second notice covers the judgment and you will not be heard to argue this.

If I may digress for a moment, I think the --

Byron R. White

Mr. Bordwin.

Milton Bordwin

Sir?

Byron R. White

I gather that you're not arguing -- you don't argue now that your first notice of appeal had any -- well, you --

Milton Bordwin

I -- I --

Byron R. White

You admit that it was premature?

Milton Bordwin

No, I wouldn't admit it.

I say the question in my petition but it is one of the weaker arguments which isn't as clear as it might be on the law and the --

Byron R. White

You don't argue it in your brief.

Milton Bordwin

I don't argue it, no.

I have no need to fall back on that.

If I might digress for a moment, the error that the Court of Appeals seems to have fallen into here is failure to distinguish between two separate and distinct concepts.

On the one hand, appellate jurisdiction, on the other hand, scope of the appeal.

Now, appellate jurisdiction using the word jurisdiction in its strict sense, and by strict sense, I mean impersona jurisdiction or jurisdiction over the subject matter of the interim action or the peculiar competency of a court of limited jurisdiction over a certain case or class of cases such as probate courts,

military courts.

This type of jurisdiction is required in order for a judgment to be valid that is not void and not collaterally attackable.

Now this type of jurisdiction, the late Judge Hand addressed himself to in the area of appellate jurisdiction.

In the case cited by the defendant in her brief in our position on page 8, Federal Deposit Insurance Corporation versus Congregation of Poile Zedek.

Judge Hand says, “Some paper must be filed in at least one court -- excuse me, or the other to constitute a notice of appeal.

The least requirement which will be tolerable is that some papers shall be accessible in the records of the court upon which both judges and parties can rely”.

In that case, the appellant had merely sent a letter to the appellee indicating an intention to appeal.

But this is what is required for appellate jurisdiction.

But once that paper is filed, we submit, appellate jurisdiction is complete.

The Court has the -- the Appellate Court has confidence over the action.

The next question, the question of the scope of the appeal is separate although the scope of the appeal is usually determined from the very notice from which appellate jurisdiction is derived and it's the notice of appeal which specifies the judgment or portion thereof, many courts have looked outside of the notice to find the intention to appeal, witness that line of cases we cited in our petition for rehearing.

They have looked to designations of record on appeal.

They have looked to that statement of points.

They have looked to the briefs.

We cite these cases in our brief.

Indeed, one case which the defendant cites for the proposition that the second notice is inadequate to raise the judgment on appeal, Carter v. Powell on page 14 of her brief, there, the Court looked also.

This is a 1939 case and the Court there said, “The statement of points and designation of contents of record on appeal indicate that nothing else was intended to be relied on by appellants in this Court.

Under the new rule cited, the appellants were not required to and did not appeal from the entire judgment".

Thus, the courts have looked.

In that case, they found after looking at these other papers, no intention to appeal.

In our case, the Court closed is eyes to the other papers.

One, final area of issues is that involving the question of whether the complaint as it stood was sufficient to base a claim for recovery in quantum meruit.

Neither the District Court nor the Court of Appeals addressed themselves to this.

I would like to quote merely a few brief lines which give us the rules in this area.

This Court in Conley versus Gibson said, "The accepted rule -- the accepted rule is that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle to relief.

In Hodges v. Renfroe which we cite on page 34 of our brief, "It is the duty of the Court to grant the relief to which the plaintiff is entitled irrespective of the prayer for relief".

This reflects Rule 54 (c) which says, "Every final judgment shall grant the relief to which the party and whose favor is rendered is entitled even if the party has not commanded such relief in his pleadings.

Could I ask you a question.

As I understand you, the Court of Appeals dismissed the appeal sua sponte in effect.

In other words --

Milton Bordwin

That's right.

-- there was no motion by your opponent (Voice Overlap) --

Milton Bordwin

No, that was raised on the courts only.

Now, on your petition for rehearing, did you ask the Court of Appeals to take a look at your January 17 appeal in interpreting the scope of your January 26 notice of appeal?

Milton Bordwin

In our petition for rehearing, we cited the -- this line of cases which said, you look out -- you must -- you can look outside of the notice of appeal --

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Yes.

Milton Bordwin

-- because in those cases, the only mention in the notice of appeal was the denial of post judgment motions.

This was the essence of our petition for the --

Well I -- I guess the answer to my question --

Milton Bordwin

Yes sir.

-- is the Court of Appeals displayed knowledge of your earlier appeal in it's your original opinion and all you were arguing --

Milton Bordwin

Yes sir.

-- all that you're arguing was that they should've interpreted your later appeal in

relation to the scope of your earlier appeal.

Milton Bordwin

That's right.

In any event, I say that the intention of the appellant which if there is a proper manifestation in the file of such intention, that is what governs the scope of appeal.

This case then in summary simply involves the plaintiff's right to have a case heard on the merits since it was here possible without any judicial strain on the Court's own terms.

The immediate issue involves construction of certain Rules of Civil Procedure and that will depend in turn on this Court's attitude toward the rules and the Rule of Procedure in the courts.

This Court has stated again in Conley and Gibson, "The federal rules reject the approach that pleading is a game of skill in which one misstep by counsel maybe decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits".

This we submit was disregarded by the lower courts where they have the choice of 59 or 60.

They chose the choice that foreclosed the hearing on the merits.

They will wear of alternative results but this played no part in their coming to a decision.

On the intention to appeal, we submit, this is clear in our case than in any of the cases we've cited to the courts below and to this Court.

And yet, the Court not only says your intention must appear from the second notice of appeal or not at all.

They have disregarded the obvious.

And third, we say that the wrong stated is the essence of the complaint and the wrong is stated in our complaint.

Moneys were extended, services were rendered for the benefit of the decedent.

At least a quantum meruit recovery was -- should've been here allowed.

In conclusion, I would merely say that the plaintiff Mrs. Foman is no lawyer and

she will understand little of what has happened in the case so far.

All we can tell her is that through the ingenuity of a federal judge, she has been denied her day in court for no good reason as far as we can see.

If these decisions below are committed to stand, they will constitute a travesty on justice and in view of development of the federal rules a long step into the past.

Thank you for your attention.

Earl Warren

Mr. Shaine.

Roland E. Shaine

May it please the Court.

I think that the best way for me to get out the differences between the parties here is to take up two illustrations of -- from the presentation of my Brother.

For example, in the matter of the application of Rule 59 or Rule 60, it's presented to the Court as a simple matter of let us say, case.

This view, however, is to disregard the integral path of the differences in those Rules and the parts that they are to play in the appellate system as set up by the statute and filled out by the Rules.

The fist step required by the statutes in taking an appeal in the federal courts is of course to have a final judgment.

Now the concept of a final judgment long precedes the promulgations of the Rules of Civil Procedure.

For example, in Baltimore Contractors Inc. against Bodinger in 19 -- decided by this Court in 1955, the Court reaches that to a decision in 1891, McLish against Roff cited in our brief at page 11.

To point out the policy of the statutes in the matter of finality of judgment to have the whole case and every matter in controversy in it, decided in a single appeal.

Arthur J. Goldberg

Mr. Shaine, (Inaudible)

Roland E. Shaine

Yes, I was.

Arthur J. Goldberg

Have you ever (Inaudible)

Roland E. Shaine

Now, the counsel is correct in that the intimation of this issue was first made by one of the Court of Appeals.

Arthur J. Goldberg

And you regard yourself as being in the Court of Appeals and comment on (Inaudible)

Roland E. Shaine

That is correct.

Now then, we come to the relationship of Rules 59 and 60 in terms of a final judgment or decree.

Rule 59 provides for the service of a motion to alter or amend judgment within 10 days after the entry of judgment.

And by the operation of Rule 73, such a motion would have the effect of suspending the finality of the judgment with respect to the motion under Rule 59 as presented.

Rule 60 deals with motions to relieve from such matters as mistake, inadvertence excusable neglect.

And altogether, different set of circumstances than those contemplated by Rule 59 and without any provision for suspending the finality of the judgment.

Now, it is therefore it seems to us, a manifest purpose of the Rules and the Rule 73 in suspending the finality of a judgment upon a timely motion under Rule 59 to hold up the finality of a case for that period of time in order to let -- to reserve to the trial court the jurisdiction we wish to deal with the matter at hand.

In this manner, the policy of a finality of judgment for appeals is advanced.

And it is within this concept that we can see why there really can be no quarrel with the view of the Court of Appeals that the full context of the Rules dictates that resort be made to the procedure under Rule 59 if the time for applying for such motions has not expired.

In pressing the position that my Brother has advanced, he entirely disregards the effect that such an application of the Rules would have upon his own case.

For if the motion to amend were indeed treated as coming under Rule 50 -- Rule 60, thereby giving finality to a judgment of the District Court.

The District Court at the same time would have been deprived of jurisdiction with which to deal with the very motions that the plaintiff brought to vacate the judgment or to amend the -- and then to amend the complaint.

Because once there has been a final judgment and appeal has been -- an effective appeal has been taken the jurisdiction of the trial court is ousted and invested in the Appellate Court.

With regard to Rule 59, I would like to call the Court's attention to the fact that in our briefs and in the opinions of the Court, the bringing of the motions by the plaintiff to vacate judgment and to amend her complaint, spoken of as having been brought, having been made, having been filed.

Rule 59 (e) actually reversed to a motion to alter or amend the judgment shall be served not later than 10 days after the entry of the judgment.

And I would like to direct the Court's attention to the fact that in this case, those motions were actually served on the defendant on the same day as they were filed in the Court, namely December 20th, 1960.

Now, as a further illustration of the failure of the appellant to come to grips with the true issues in this case, I would like to allude to Conley against Gibson of which my Brother has made much in argument as in his brief.

This reduces itself really to a little more than the quotation of a nice sounding language from cases that have no application, added to by the citation of cases which are only within the general area of the issues before the Court.

It is true that Conley against Gibson says that the federal rules reject the approach that pleading is a game of skill, and certainly, the appellee subscribes to that but Conley against Gibson is really not authority in this case because Conley against Gibson dealt purely and simply with the question of whether or not under the Federal Rules of Civil Procedure, the complaint in that case did or did not set forth a sufficient cause of action.

Now, to proceed to a further point in the same order as my Brother, my Brother has discussed the question of whether or not the original complaint comprehended an action in quantum meruit.

To be sure, that problem was not before the Court of Appeals anymore than it is before this Court.

My Brother, however, makes much of the fact that the opinion of the District Court does not allude to this issue at all.

There is a very simple sufficient explanation of that fact and that is just as in the appellant's brief before this Court at pages 32 and 35, so in the District Court on the argument on the defendant's motion to dismiss, the plaintiff quite deliberately presented her case as setting forth one claim and one claim only and that was an action on the alleged oral contract.

It is explicit in her complaint.

It was explicit in her argument of the motion before the Court and it is as far as the memorandum of decision of the District Court is concerned, it took -- it did nothing more than take the plaintiff, appellant and their word and in good faith proceeds accordingly.

Now, the next matter with which my Brother dealt is the content of her motion to amend set forth in page 10 of the record.

I wish to make it abundantly clear that the error to which my Brother referred is not in the reproduction of that motion to amend or rather the proposed amendment as set forth in the transcript of the record.

There was no print as -- error there at all.

The proposed amendment as it appears in the printed transcript is exactly as it was presented to the District Court.

And it is apparent from a reading of the proposed second cause of action that what the plaintiff was there proposing by way of amendment was a claim in quantum meruit not for services rendered for and on behalf of the decedent which was in general, the concern of the original complaint but for the payment of money and the rendition of services for and on behalf of Elvira A. Davis.

Now, if we -- we cannot dispose of this in the manner that my Brother has so far as the Court of Appeals' opinion is concerned.

The Court didn't go into the question.

It took the motion as a self-style amendment by adding a second cause of action.

And that was as far as the Court of Appeals had to go for its purposes.

Hugo L. Black

Why did the District Court deny that motion to amend?

Roland E. Shaine

This Your Honor, is the key to the appellee's point on this and that I believe explains the position of the Court of Appeals, that the argument before the District Court, defendant raised the inadequacy of the motion to amend in this respect.

The plaintiff shows to make light of it and say that there was no mistake and insistent that there was no mistake.

Potter Stewart

You're still referring to the use of defendant instead of decedent?

Roland E. Shaine

That is correct.

The opportunity existed then and there for the plaintiff to have (Inaudible) it out.

The plaintiff for her own reasons chose to leave the dilemma with the Court, and the Court obviously was entitled to consider it as the inadequate motion to amend that it was.

Hugo L. Black

What is the dilemma?

Roland E. Shaine

The original complaint Your Honor.

Hugo L. Black

I mean in this amendment -- second amendment complaint on page 10.

What's wrong with that?

Roland E. Shaine

It says that in paragraph 2 --

Hugo L. Black

Yes, what's wrong with that?

Roland E. Shaine

The defendant, that's Elvira A. Davis.

Paragraph 1, Your Honor, says the defendant is Elvira A. Davis.

Paragraph 2 says the defendant and that is to say Elvira A. Davis, owes the plaintiff $12,500.

The money is paid for and on behalf of the defendant.

Now, the defendant properly raised this as one ground of objection to allowance of the proposed motion and the Court turned to the plaintiff for explanation or discussion or whatever else might have been expected.

The plaintiff score on the issue all together.

Now, we submit that it is not an abusive discretion for a District Court under these circumstances to refuse to allow a motion to amend which to say the very least would have to be amended again.

William J. Brennan, Jr.

Well, I don't quite understand Mr. Shaine, this -- does this go to the merits on the appeal, what's this got to do with the issue before us whether it was proper to dismiss this (Inaudible)

Roland E. Shaine

Well, the appellant, Your Honor, claims that the District Court abused its discretion in denying that motion to amend by setting forth this second cause of action.

William J. Brennan, Jr.

Oh, you mean this is a second point in addition to the one on the rule?

Roland E. Shaine

Yes, Your Honor.

William J. Brennan, Jr.

Is that it?

Roland E. Shaine

Yes.

That is to say, under the rules, we were concerned with whether or not the motion to vacate and the motion to amend neither did not suspend the finality of the (Voice Overlap) --

William J. Brennan, Jr.

Yes, that's the -- it's the support point raised from these questions presented, is that (Voice Overlap) --

Roland E. Shaine

That's right sir.

And that's why I say, that it re -- it comes right to the issue.

And I submit to this Court that it must transfer itself to the situation with which the trial court was confronted.

The party's litigant appeared before the Court and invites the Court's attention to a particular aspect of the case by virtue of papers and motions which are filed with the Court and it is for the Court to try to govern the procedure along sensible line.

William J. Brennan, Jr.

But I gather Mr. Shaine, if we think the Court of Appeals is wrong in dismissing the appeal, we don't have to reach this (Inaudible) --

Roland E. Shaine

I would say that's true.

William J. Brennan, Jr.

That's in the merits in the appeal including this point I would suppose that this were before the Court of Appeals.

Roland E. Shaine

Although, Your Honor, perhaps I'm not doing justice to the appellant in that respect.

I suppose that in fact -- and this really again goes to the heart of the position of the Court of Appeals upon further reflection.

The fact is that what the appellant wants here is consideration of the propriety of the dismissal of the appeal because it didn't set forth a cause of action which is one point.

Then if it goes back say to the Court of Appeals and the Court of Appeals holds that the District Court was correct in that respect, the appellant plaintiff would then want to be heard on the propriety of the denial of its motion to vacate and amend.

Perhaps it would want a ruling on that anyway to enlarge that grounds on which it would go before a jury.

But this of course is -- comes right to the heart of the position taken by the Court of Appeals with respect to the sufficiency of the second notice of appeal to raise anything more than the question of the abusive discretion by the District Court in denying the motion to vacate and to amend.

And again, I brought to what I consider to be an essence in the issues which my Brother has chose to disregard.

In his resort to the language such as he quoted from Conley against Gibson about that rules not being a game.

Of course, they're not a game but a well ordered system of procedure also is important for the promotion of justice, and to paraphrase the language of the Court of the Third Circuit in Healy against Pennsylvania Railroad.

We are not oblivious of the trend away from a nice and easy procedure but we do not feel that we are asking this Court to decide these questions on the basis of barren formal technicality.

We say that it is of the highest importance that the appellate function be free of jurisdictional doubts when they can be so simply avoided by compliance with a few specific requirements of the federal statutes and the federal rules.

Now, to come to the next point with which my Brother dealt.

Again, on the issue of the abuse by the District Court of this discretion in denying the motions to vacate and amend, (Inaudible) my Brother takes the premise that the District Court was bound to follow Cleaves against Kenny decided in 1933 by the First Circuit prior to Healy against Railroad and by a divided court.

As was brought out by a question from Justice Douglas, this case of course is purely and simply a diversity jurisdiction case.

The question -- the basic question of law is one of Massachusetts law, the interpretation and application of the Massachusetts statute of frauds in this regard.

A District Court of course is not bound to follow a -- an earlier determination by a Court of Appeals on the matter of the interpretation or application of a state statute as was said by this Court in Thompson against Consolidated Gas Utilities Corporation cited at page 23 of our brief.

The federal courts cannot settle the proper construction of state statute and if we look at the memorandum decision of Judge Ford in the case at bar, we will see that Judge Ford diligently considered the question of the Massachusetts law and on the basis of decisions since Cleaves against Kenny came to the honest, sincere conclusion that Massachusetts law was not as the Court of Appeals had annunciated it in Cleaves against Kenny.

And that is --

Hugo L. Black

(Inaudible) he followed the dissenting opinion in the Court of that -- at that time?

Roland E. Shaine

The view of Judge Ford, it does happen, coincided with the minority view expressed in Cleaves against Kenny.

Hugo L. Black

Quoted from it did he not as calling it what might be (Voice Overlap) --

Roland E. Shaine

Yes, he did.

Hugo L. Black

-- for what?

Roland E. Shaine

Yes, he did.

At the same time, Your Honor, he referred to a more recent Massachusetts case as indicating that the Massachusetts Supreme Judicial Court would not give the literal application of the statute of frauds that the Court of Appeals had in Cleaves against Kenny.

But suffice it to say that it is manifest that Judge Ford was attempting properly to discharge his duties under Erie Railroad against Tompkins and particularly where he is a district judge sitting in the District of Massachusetts and is close to the Massachusetts law.

I think that it would -- he is entitled to be spared condemnation as having abused his discretion in the resolution he made of this particular matter.

Hugo L. Black

But we do have a situation, do we not, where he has expressly refused the problem, a clear opinion in contrary to what he decides.

Roland E. Shaine

Your Honor, I would ask that Judge Ford's opinion be read with consideration of the fact that he is the trial judge who is disposing of these matters as part of litigation and that his whole memorandum decision must be read as a whole.

And while it is true that he is quite forthright in expressing his own conviction that Judge Morton was correct rather than the majority in Cleaves against Kenny.

He does say that the -- in the second to last paragraph of his opinion on page 8 of the transcript.

The only recent interpretation of Section 5 by the Massachusetts courts in West against Trust Company, 328 Massachusetts which is a fairly recent decision.

The -- indicates that the Massachusetts court would not adopt the strictly literal construction of the majority in the Cleaves case.

Now I think --

Do you think this question is before us on the writ of certiorari.

I don't see that we get -- why do we have to get to the merits of this?

Roland E. Shaine

This is not on the merits and should not be considered on the merits.

Its pertinence is that my Brother has adduced Cleaves against Kenny as an example of how the District Court abused his discretion because it denied -- it leave to amend when it had failed to follow a decision which my Brother presents as having bound the District Court.

I am suggesting that there was no abuse of discretion by the District Court on that respect because the District Court was not bound to follow Cleaves against Kenny because Cleaves against Kenny could not settle anything if there were subsequent Massachusetts law.

But that isn't the only question we have up here as to whether the Court of Appeals is right or wrong in dismissing the appeal.

What else is there?

Roland E. Shaine

Because --

It isn't (Inaudible)

Roland E. Shaine

-- if it goes back to the -- if it goes back to the Court of Appeals on this question of the sufficiency of the complaint and the Court of Appeals goes along with Judge Ford and holds that Massachusetts law would not have entitled this plaintiff to a recovery.

Then there is still the question as to whether the Court should, the trial court should or should not have allowed the plaintiff's motion to amend.

Oh, we've just been giving the Court of Appeals' advisory opinion.

Roland E. Shaine

Well, to be sure, that's true.

That's none of our business.

We haven't gotten jurisdiction under that (Inaudible) --

Roland E. Shaine

Well, I know that if I were trying a plaintiff's case, I would want to go on a jury with a two-prong complaint would account such as was set forth in the original action and one in quantum meruit because if I didn't satisfy the jury if it was a contract, at least, I would want to recover in quantum meruit.

But perhaps, this Court should contempt itself with the issue of the -- whether the Court was correct, the Circuit Court was correct in holding that the merits were not brought before it by either the first or the second notice of appeal.

Arthur J. Goldberg

(Inaudible) I'm reading through the Court's --

Roland E. Shaine

Yes Your Honor.

Arthur J. Goldberg

-- proceeding.

Roland E. Shaine

Yes Your Honor, the --

Arthur J. Goldberg

(Inaudible) that they dismissed one appeal from the (Inaudible)

Roland E. Shaine

That is correct.

Arthur J. Goldberg

And the third or the second one saying they could not consider the judgment, the second appeal, but they could consider the denial of (Inaudible)

The District Court abused its discretion.

Roland E. Shaine

That is correct.

When I said about -- that they haven't ruled on the merits, I meant with respect to the --

Arthur J. Goldberg

The judgment --

Roland E. Shaine

-- the judgment dismissing the complaint.

That is correct.

My time has expired.

Earl Warren

Mr. Bordwin.

Milton Bordwin

Just three small points.

One is a point that we address ourselves to in our brief.

Mr. Shaine has said that if the first motion is a 60 motion, the Court of -- the District Court is ousted of jurisdiction and then how can it rule on the motions.

In our brief, we answer this in two ways.

First, the courts that have addressed themselves to the question say that the District Court retains jurisdiction to consider and deny such motions even after a notice of appeal has been filed.

Second, is the general plenary appellate jurisdiction of this Court and the Court of Appeals enables appellate courts to dispose of the entire case and since we have rulings by the District Court on these motions, it becomes really irrelevant in that sense as to whether it had jurisdiction strictly because this Court surely will not send it back for a ruling that has already been made.

On the second point, my Brother says that the quantum meruit issue and that is whether the original complaint stated a cause of action in quantum meruit was not raised to the Court of Appeals.

If the Court will notice page 15 of our brief in the Court of Appeals, copies of which were furnished to the Court.

Page 15, part B begins in our complaint.

The appellant sets forth a state of facts under which if she could not recover for a breach of an expressed oral agreement, she nevertheless could recover upon a quantum meruit.

This is a sub-question under our -- in the way our brief is set up, that is we say we have the right to amend being the central question, the first sub-question being that there was no need to amend, the court have stated a cause of action.

The final point is that -- is on this defendant decedent issue.

The defendant here -- actually, there are two defendants.

The defendant here if the Court will note page 1 which starts -- states the name of the case is the good effect and credits of Wilbur W. Davis etcetera.

It's an estate.

There is a defendant who is an individual but she appears solely in her legal representative capacity as executrix and it seems completely out of line to believe that she would have any connection with the facts underlying the case because she doesn't appear here in her individual capacity, so references to the defendant are even taking my Brother's point of view, references to the estate.

Finally, I want simply to say that the references to the District Court argument would not seem to us to be relevant here.

I cannot refute them as I was not there.

All we have to go on is the memorandum opinion of the Court and the papers in the file.

Thank you again.